

ARKANSAS BAR EXAMINATION

JULY 1997

2 pages

30 minutes

CONSTITUTIONAL LAW

The Van Buren and Saint Looie Railroad Company offers an old time Pullman sleeper car tour package from Van Buren, Arkansas to St. Louis, Missouri. The tour begins in Van Buren and proceeds with stopovers to see the sights and shows of Eureka Springs, Branson, and St. Louis. Passengers embark at Van Buren at 2:00 p.m. and arrive at Eureka Springs where the passengers may dine, see a show, and sleep in the Pullman unit which leaves Eureka Springs at midnight. The train arrives in Branson at 6:00 a.m. (a real Slow Train Through Arkansas) and leaves at midnight for St. Louis, giving plenty of time to see the shows. In St. Louis, the passengers can catch a Cardinals game in the summer, or take a tour of the magnificent old homes. At midnight, the train leaves St. Louis and arrives back in Van Buren by noon. Missouri Statutes 11:35:301 (a) says:

"All conveyances which operate in this state, including any automobile, truck, bus, train, sleeper car, airplane, tractor, or any other means of travel using the roads, rails, or airports of this State, public or private, are hereby declared to be 'drug-free zones.' If it is found that any passenger or occupant or driver or crew member in any of the aforementioned conveyances possesses or uses on the conveyance aforesaid any drug listed as a controlled substance as defined by Missouri Statutes 16:23:117, then the conveyance will be forfeited to the State by proceedings commenced in the Circuit Court of the County in which the illegal possession or use has occurred. The owner's innocence and precautions against drug violations are no defense to forfeiture; however, an innocent owner may sue a passenger for any loss occasioned by the passenger's possessing or using unlawful drugs in the conveyance."

Because of the Missouri law, the Van Buren and Saint Looie Railroad uses an extremely sophisticated Drug Dog to smell out drugs on boarding passengers, and has caught 93 passengers and turned them over to the police in the last five years. (If that isn't enough for your tastes, and you really want to bind the cheese, make that the last five weeks). Peter Penniless purchased a ticket in Van Buren to take the sleeper car tour to St. Louis. He had a vial of XK43, a lawful chemical which would not alert Ole Nosey, the Railroad's prize drug dog. He also had a vial of 34KX, another lawful chemical, that would not cause Ole Nosey to holler. After taking in the Pat Boone-Anita Bryant-Donnie Osmond show in Branson, Penniless returned to his sleeper car, mixed the XK43 and 34KX, and made the baddest drug in the whole Missouri lawbook. Drove him crazy. He was doing Loop-de-Loops in the tiny Pullman unit, and singing Nine Inch Nails songs at the top of his lungs. When the police came, he opened the door, and the smell of the XK43-34KX nearly drove Ole Nosey to an early grave. The State of Missouri now moves to forfeit the conveyance under Missouri Statutes 11:35:301(a). Will the United States Constitution allow the State of Missouri to order the train (or any part of it) to be forfeited under Missouri Statute 11:35:301(a)? Just answer the forfeiture question; do not address any perceived "search and seizure" issues involving Ole Nosey, or any First

ANSWER

This answer will discuss the 8th Amendment, 14th Amendment Due Process, Equal protection, and the Dormant Commerce Clause.

8th Amendment Recently Supreme Court cases have been concerned with whether forfeitures violate the eighth amendment prohibition against cruel and unusual punishment. The Supreme Court often has held that forfeitures are not considered "punishments" at all. The forfeiture laws are subject to a reasonableness standard. Indeed, a recent Supreme Court case upheld the forfeiture of a car used for illegal purposes by a husband, even though the wife claimed joint ownership in the car, and she did nothing wrong.

However, the Supreme Court cases have dealt with forfeiture when an owner was involved in illegal activity and used the property in furtherance of that activity. Here, the train company was the owner, and the train company did nothing wrong. Punishing a totally innocent party for the actions of a non-owner could violate the eighth amendment. Certainly, it would be a cruel and unusual punishment (i.e., beyond the bounds of what civilized society expects) to take property from the train company because of Penniless's actions.

Due Process Because the Supreme Court has upheld most forfeitures under the eighth amendment, the railroad should also challenge the law under the due process clause. Substantive due process provides that every law must at least be rational and not arbitrary.

A higher standard is used to examine laws which impact on fundamental rights. While there is a fundamental right to interstate travel, that right is impacted only by such things as residency requirements before receiving state benefits. Therefore, the rational basis analysis applies here. It is important to note that the Supreme Court has recently struck down a "punishment" under rational basis. Rational basis review requires that the law be rationally related to a legitimate state interest.

The Supreme Court recently struck down a court's (jury's) punitive damage award on the grounds that it was grossly excessive in relation to the state's interest in preventing and punishing misconduct. The railroad could argue that taking the train is grossly excessive in relation to punishing or preventing unlawful drug use. However, as with most cases under rational basis, the law is likely to be upheld.

Equal protection The equal protection clause also prevents irrational laws. A higher standard of review applies only if a classification is drawn on the basis of exercising a fundamental right or a suspect class. Neither is implicated here, so the above rational basis analysis would also apply under equal protection.

Dormant Commerce Clause Finally, the railroad's strongest argument for striking down the statute is the Dormant Commerce Clause. If Congress has not acted, states are allowed to pass laws regarding commerce, but those laws cannot discriminate against interstate (or out of state) commerce or unduly burden interstate commerce.

The law here is not facially discriminatory, but it does place a burden on interstate commerce. Every conveyance, to avoid forfeiture, must undertake extreme measures (such as having a drug dog sniff passengers) in order to enter Missouri. This burden could prevent many operators from going through Missouri at all - requiring expensive changes in their routes and so on. When weighed against the state's admittedly important interest in preventing and punishing drug use, the burden is still too excessive. This is the railroad's best defense to the forfeiture - to argue that the law unreasonably burdens interstate commerce.

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PROPERTY

1

Wife filed suit for divorce against Husband seeking, among other things, the sale of a house acquired after the marriage. Prior to their marriage Husband had owned a house which he sold and after satisfaction of liens received \$20,000. After their marriage, Husband and Wife bought a house and title was taken in the name of "Husband and Wife, his wife." The \$20,000 was used as down payment. In his answer to the divorce complaint, Husband asserted that he was entitled to the first \$20,000 realized from the sale of the house they had acquired after their marriage. How would you rule on this issue and why? Would your answer be different if title to the house had been taken in the name of the Husband alone? If yes, how would it differ and why?

2

A and B are adjacent landowners. The property they own was once part of a single 4 acre parcel owned by C. C lived in a house on the South 2 acres. There was a road used as a driveway that ran from the North boundary of the property across the entire tract to the house of C. C sold the South 2 acres to A. He later sold the North 2 acres to B. B built a house on the North 2 acres and used the road to get to his house. From time to time A repaired the road, and used it, along with B, as his own. A road was constructed by the County along the South line of A's property, thus giving him access to his property from the South. B placed a fence across the old road that they had both used for years thus denying A use of it. A filed suit seeking to require B to remove the fence claiming that he had an easement over that road and that B did not have the right to block it. How would you decide and why?

3

A leased Blackacre to B by written lease for a term of three years beginning January 1, 1990, and ending December 31, 1992, at a rate of \$50,000 per year. At the end of the three year term, B continued to farm Blackacre and to pay the same rent that he had paid during the original term. On December 1, 1997, A notified B that his lease would terminate December 31, 1997. B

refused to vacate the property. A filed suit for ejectment. Who should prevail and why?

ANSWER

#1 Tenancy by the Entirety

The house is marital property because it was purchased after Husband and Wife married. Although the \$20,000 was separate property prior to marriage, it transmuted into marital property when the house was purchased after marriage. The proceeds should be equally split.

In Arkansas, it is presumed that when a married couple buys property together, it is purchased in the concurrent ownership of tenancy by the entirety, unless otherwise specified by the couple. Elements of the tenancy are:

(1) marriage (they were married at the time) (2) time (the couple received the interest at the same time) (3)

interest (they received the same amount of interest in the same instrument)

(4)

title (they have the same title to the property)

(5)

possession (they have the unexclusive right to possession of the whole property)

This tenancy has a right of survivorship.

The tenancy can be destroyed, among other things, death and devise. Therefore, the couple's tenancy is destroyed and they are tenants in common.

If Husband had taken the title to the house in his name only, then arguably the \$20,000 could be traced as separate property. The house itself would be marital property because it was obtained during the marriage. However, the \$20,000 would be separate and he would have a right to it, and the rest of the sale proceeds would be split between the couple.

#2 Easement by Implication and Prescription

A may have an easement by implication. This arises in two ways:

(1) continued use by a prior owner or (2) easement by necessity -- a landowner cannot be landlocked.

As the owner, C would have the easement as an owner of the property who continued to use the easement. However, he sold the property to A. A's chance is for an easement by necessity. He was landlocked because his only way to get off his property was by the road across B's property. However,, the necessity ended when the county built a road along A's property, giving him the opportunity to get off his problem, thus eliminating the necessity.

Easement by Prescription

A's best argument is that he received an easement by prescription. He must meet the following.

- (1)
adverse to owner - this is simply a trespass. A was trespassing on B's property as he used the road.
- (2)
owner was aware of use - the facts don't show that B wasn't aware. In fact, the facts say B and A both used the road.
- (3)
without the owner's permission - there are no facts suggesting that B gave permission to use the road. In fact years later, B blocked off road.
- (4)
open and notorious - A openly used the road as his own, as the facts state, and he repaired the road from time to time.
- (5)
for the statutory period - in Arkansas, adverse possession is for seven years. If A used the easement for seven years, then it's his.

If A can prove these elements, then he has an easement by prescription,

#3 Tenancy for Years and periodic Tenancy

The tenants should prevail because of improper notice.

Tenancy for Years

The lease between A and B was for a tenancy for years because there was a fixed term in the lease. The lease terminated on it's own terms.

Periodic tenancy

When the lease ended and B became a holdover tenant (legally able to be on property because of lease, but was holding over because lease ended), this tenancy was created because A continued to accept rent payment in the amount from the old lease. The new term is from year to year because that's how the old lease payments ran.

To end a periodic tenancy proper notice must be given for the effective date. For a year to year tenancy, there must be six month's notice given by the landlord or the tenant.

Here, the landlord is improperly terminating the lease because he failed to give proper notice. Thus, the tenant should prevail.

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CONTRACTS

Your first client after you pass the bar exam asks you to handle the legal work for the sale of his business. He agrees in writing to pay you \$30 per hour of work "plus an appropriate share of profit from the sale." At that time the amount of profit is not known, but you believe your efforts will help to maximize the profit and that your client will be greatly pleased. You go to work and after 40 hours of work close the sale. Your client has a \$100,000 profit. When he hands you a check for \$1,200 you remind him of the legal services agreement. He declines to pay you any more saying that he did not expect you to have to work so many hours, which he attributes to your inexperience.

1.

Can you recover more than \$1,200?

2.

Discuss all the legal issues in detail.

ANSWER

(1) This poses interesting contract questions as well as professional responsibility questions. I don't believe that a court will allow him to recover more than \$1,200 on the contract, but may allow him to recover more in quasi-contract if it can be shown that the client benefitted more than \$1,200.

(2) Ignoring the professional responsibility questions such as full disclosure regarding contingency fees, several issues are raised. The terms of a contract must be definite and certain to allow a court to fashion an appropriate remedy. In this example, the contract stated "an appropriate share" & this is not in any way definite. It leaves it up to the client to determine the amount. Therefore, the court is likely to just ignore the "contingency fee" (had this been an Article 2 case, the court would be much more likely to insert a reasonable amount of compensation because the UCC wants to find a contract wherever possible, but we aren't dealing with goods).

This clause is also ambiguous. When the parties to a contract have 2 different meanings to an ambiguous term, the court will strike down the contract or clause (like in the case with the 2 ships named Peerless that came into dock 6 mths. apart). In this case, I am sure the lawyer had attached a high share of the proceeds and the client a low share, so it is likely the court will strike the clause or contract. (However, either party would be able to use parol evidence to show what the parties actually meant because this is an ambiguity if there actually was a percentage set.)

Since the clause is struck down, the court may use the doctrine of quasi contract to allow the attorney more than the \$1,200. Quasi contract is to prevent unjust enrichment of a person when

someone does something that puts them in a better position. In this case, it is clear that the parties intended for the attorney to have more than just \$30/hr. So the court is likely to award the attorney some amount (may look to what it would have cost the client if he had gone to another attorney, the difference between the fair market price and what price the attorney got for the client, etc.) So therefore, if the attorney enriched the client more than \$1,200 the court will likely give him the extra (as long as the professional responsibilities issues don't come in and they don't punish the attorney for having such a poorly written contract).

It is also important to note that if this actually goes to court, the judge has the discretion to award attorney's fees per statute.

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CRIMINAL LAW AND PROCEDURE

Jeff and Bob teased Ted about being afraid to commit a robbery. Jeff handed Ted a gun that was in his glove compartment and dared him to commit a robbery. Ted was reluctant to participate, but when he saw a lady going to her vehicle, he jumped from the car and shot her and stole her purse. Jeff started to drive away, but Ted opened the car door and jumped in the moving vehicle. Bob took the weapon and buried it in a field near his house. The contents of the purse were given to Joe and he attempted to use one of the credit cards to rent a video. The video owner called the police when it was discovered that the credit card had been stolen. Joe gave a statement implicating Jeff, Bob and Ted in the homicide. The Arkansas State police charged Jeff, Bob and Ted with aggravated robbery and murder in the first degree. Joe was charged with theft by receiving.

Discuss whether the statement of a co-defendant is sufficient for a conviction. Discuss the elements of proof that the State must present to convict Jeff, Bob and Ted of aggravated robbery. Discuss the elements of proof that the State must present to convict Jeff, Bob and Ted of first degree murder.

ANSWER

I. Aggravated Robbery - Elements The State must prove each element of aggravated robbery by "proof beyond a reasonable doubt." These elements must be established with respect to Jeff, Bob and Ted.

To be convicted of aggravated robbery, the state must prove beyond a reasonable doubt that a person acting alone or with others

1.

while in the commission of a misdemeanor or a felony theft or in the flight therefrom

2.

have the purpose of depriving the property of another

3.

permanently deprive that person's property, and

4.

does so by threat or force

5.

with a deadly weapon or an object calculated to do the same

6.

indicates by words or conduct that such threat or force will be used.

Ted must have had the "purpose," mens rea (the culpable mental state) and a "voluntary act," (actus reas) or "guilty act." Here, Ted was reluctant but formed the proper mental state and made it his "conscious object" under the attendant circumstances as he knew them to be, and committed the offense. Ted was the cause of the offense, because "but for" his conduct, the offense would not have occurred unless another cause would have sufficiently caused the result and Ted's actions were insufficient.

Jeff and Bob are likely to be charged as accomplices. For accomplice liability to attach, the state must prove each element beyond a reasonable doubt. The elements include a person who acts alone or with others has the "purpose" to see the crime committed and "helps" in some way (encourages, aids, abets, advises, etc.) the other person in furtherance of the crime. The "actus reas" is the "help." In our facts, Jeff handed Ted the gun. This satisfies the "actus reas," the guilty act. Jeff probably had the "mens rea" of "purposeful" because it was his conscious object to see the crime committed.

Bob took the weapon and buried it for Ted. Bob has the "mens rea" - purposeful, because it was his conscious object under the attendant circumstances to see this crime committed. His "actus reas" was hiding the gun - the "guilty act."

Both Jeff and Bob may offer an affirmative defense which may go as follows:

1.

I did not commit the offense charged.

2.

I did not have in my possession a deadly weapon.

3.

I was unaware that the people with me were armed.

4.

I did not know they intended to commit any crime. This affirmative defense is

unlikely to be helpful under these facts but may be offered.

II. To convict of first degree murder, the state must prove by proof beyond a reasonable doubt with respect to each element of the crime that:

The defendants while in the commission of a felony or the escape or immediate flight therefrom "purposefully" caused the death of any person under conditions "manifesting the extreme indifference to the value of human life." Ted shot the lady before he robbed her under circumstances manifesting extreme indifference to the value of human life. It was his conscious object under the attendant circumstances to cause such a result. Ted satisfies both the mens rae, actus reas and cause for this death. Jeff and Bob are both guilty as accomplices and may both establish the affirmative offenses which I outlined previously.

According to the 8th and 14th Amendments of the United States Constitution, accomplices may not be sentenced to capital punishment if they neither, committed the homicidal act, possessed the deadly weapon, or knew or had reason to know his other accomplices would commit the offense. Here, first degree murder receives the punishment of only imprisonment and in Arkansas is a Class Y felony, thus the constitutional issues are not implicated.

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EVIDENCE

You have agreed to represent Plaintiff in an automobile collision case against Defendant. Your investigation has revealed, among other things, the following: Defendant passed a car driven by Witness just seconds before Defendant rear-ended Plaintiff. In addition to the physical facts which Witness describes, he informs you that when Defendant passed him he (Witness) made a comment to his Passenger as follows: "If that guy doesn't slow down, he is going to hurt somebody." You have also interviewed the police officer who investigated the accident. The officer described the physical facts that he found when he arrived at the scene. He also informed you that, from the measurements he made of the skid marks, he thinks Defendant was traveling at least 30 m.p.h. over the speed limit, which was posted near the accident scene. (1) You conclude that it is in the best interest of your client to elicit testimony from Witness concerning the statement he made to Passenger just before the accident. Briefly explain the arguments for and against the admission of that statement. (2) You also conclude that it is in your client's best interest to elicit testimony from the investigating police officer concerning his belief that the skid marks indicate Defendant's speed at least 30 m.p.h. over the posted speed limit. Briefly set out the arguments for and against the admission of that testimony.

ANSWER

I. Witness' Statement to Passenger

A. Relevance/Competence

Evidence is generally admissible if it is relevant (tends to prove or disprove a material fact in issue) and competent (witness has no sense or mental impairment, etc.) Here, there seems little doubt based on what we know that witness was able to observe the world around him and that he has evidence directly relevant to the time, place, and persons in issue.

B. Hearsay

Witness' out of court statement to passenger is "hearsay," i.e., out of court statement offered to prove the truth of the matter asserted in the statement. We are skeptical about admitting hearsay because the opposing party does not have the chance to challenge its reliability and the credibility of the speaker.

C. Hearsay Exceptions

Some hearsay is nonetheless admissible because the circumstances surrounding the statement give some assurances that the statement is trustworthy.

1. Present Sense Impression Witness' statement to passenger may be admissible as a "present sense impression," i.e., a statement made at the time the speaker was observing some event. Because he says it then when the matter is fresh, we have greater confidence in its reliability.

2. Excited Utterance The statement might also be admissible as an "excited utterance," i.e., a statement made when the speaker was excited by the events then occurring and not likely to be shading his comments for later use in litigation.

Both of these hearsay exceptions appear to apply here and I believe that on balance - the statement is admissible.

D. Prejudice

The main argument against admissibility - other than that the statement is hearsay - would be that the prejudice would outweigh the probative value. I don't think that would apply here because the statement is highly probative and although it hurts the defendant's case it is not unfairly or unusually inflammatory or prejudicial.

II. Police Officer's Testimony

A. Relevance/Competence

Again, to be admitted, the testimony must be relevant to a material issue and the witness must have minimal competence. There is no problem here.

B. Opinion

The proposed testimony of the officer is his opinion as to the speed of defendant's car.

1. Lay Opinion A lay witness may give his opinion as to a first hand observation, an emotion or

physical condition of a person, and as to the speed of a car. The officer does not have first hand information about the accident or defendant so probably can't testify as to a lay opinion.

2. Expert Opinion An expert may offer his opinion, including as to a matter like the speed of a car. A foundation must be laid establishing the expert's credentials, experience, etc. in making this kind of judgment. Also the expert must explain how he obtained his information and what information & inferences he used to form his opinion of the speed of the car. Assuming these formalities are followed the officer should be able to give his expert opinion as to the speed of the car.

If I was defense counsel I would try to prevent the officer from giving an opinion directly on the issue of whether defendant broke the law.

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TORTS

On January 1, 1997, the adult children of Mr. Jerry Atricks placed him in the Happy Days Nursing Home, Inc., (hereinafter referred to as "HDNH" or "nursing home") located in Little Rock, Arkansas. The HDNH is licensed and accredited by both the state and federal government. The nursing home boasts that it is equipped to take care of the medical, emotional, social, nutritional, and various other needs of senior citizens who can no longer care for themselves. The nursing home includes a staff of nurses as well as medical doctors of varying specialties. The nursing home has 24 hour security with video monitoring. The patients or residents are supervised and watched at all times. The HDNH is considered a medical care facility. At the time of admission to the HDNH, Mr. Atricks was 80 years old and suffered from Alzheimer's Disease. Alzheimer's Disease is thought of as a disease that affects the elderly and is characterized by "dementia" or the progressive loss of intellectual functioning. As part of his admitting history, Mr. Atricks' family reported that Mr. Atricks had difficulty recognizing his adult children, he would often wander off from his former home and would not be able to find his way back, and he was extremely forgetful and easily confused. On July 1, 1997, at about 2:30 a.m., Mr. Atricks got out of his bed on the second floor, and walked by the second floor nursing station at the very moment when the nurse had stepped away to the bathroom. Mr. Atricks then proceeded down one flight of stairs and walked out the front door past a security guard who was taking a nap. As Mr. Atricks stepped into the street in front of the nursing home, he was struck by a vehicle driven by an unknown person which immediately left the scene after striking Mr. Atricks, leaving him semi-conscious in the street. Within five minutes of the accident, a passerby found Mr. Atricks moaning in the street and emergency personnel were summoned. Mr. Atricks was taken to University Hospital where he lapsed in and out of consciousness. Two days after the accident, Mr. Atricks died at University Hospital as the result

of injuries received in the accident. Even though the driver of the vehicle that struck Mr. Atricks could not be located, Mr. Atricks' family believes the HDNH should be held accountable for Mr. Atricks' injury and death. His family comes to you for legal advice. Assuming that the above facts will not be in dispute, and are essentially confirmed by video tape recordings from the nursing home's surveillance cameras, answer the following questions:

- (1)
What cause(s) of action, if any, does the Estate of Jerry Atricks have against Happy Days Nursing Home, Inc.?
 - (2)
What are the elements of proof that will have to be established in order to prevail on each cause of action you have identified?
 - (3)
What is the applicable statute of limitations for each cause of action you have identified and why does it apply?
-

ANSWER

(1) The main cause of action that the estate has is negligence. (2) The elements of negligence are duty (acting as a reasonable person (or nursing home) for everyone within the foreseeable zone of danger per *Cardozo* in *Palsgraf* which AR has adopted). Since we are dealing with a medical care facility, it will be judged under the "locality rule" which means it is judged against medical facilities in the same or similar locality.

The next element is a breach of that duty. This is merely not acting as a reasonable person. In evaluating whether there was a breach, it is useful to use Judge Learned Hands' calculus. We must look at the (a) potential harm (very great because the facility is on a busy street and Mr. Atricks has a tendency to wander off), (b) the chance this harm will occur (very great, his family told the facility of constant wandering off), and (c) the extra burden it would place on the defendant to take precautions (The facility had video monitoring, but it sounds more like it was just used to video tape, not to actually monitor. The extra burden of having 2 nurses at the station or someone at the front door who didn't take naps would not be great). Since the elements favor Mr. Atricks, it appears there has been a breach. Note that this breach is not medical malpractice because AR courts have held that allowing a person to wander off is not medical malpractice, but is a breach of the duty that was contractual in nature (taking care of the needs of senior citizens).

The next element is cause in fact. This is merely a but for test (but for the negligence, he wouldn't have been hurt). So this element is clearly met.

The next element is proximate cause (the negligent party is liable for all the natural and probable consequences of their action). This is a little tougher of a question. Generally, a subsequent negligent or even intention tort (the unlocated driver who ran over Mr. Atricks) will not break the causal chain if it is within the scope of the risk of harm created by the negligence.

In this case, by allowing Mr. Atricks to wander out, the scope of harm would be that he would become lost or get run over while hobbling across the street. Therefore, the causal chain was not broken.

The last element is damages. This is where the family brings a wrongful death suit (suing for the amount of support that Mr. Atricks would have given, grief over his death, but not companionship damages because they are only for spouses) and a survivorship claim (suing for the injury itself to Mr. Atricks, such as his pain and suffering and other types of damages he could have recovered if he had lived).

(3) The applicable statute of limitations in AR is 3 years for personal injury types of negligence. As was said above, this is not medical malpractice so the 2 yr. statute will not apply.